IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

**NOTICE OF MOTION NO.3712 OF 2003**

IN

**SUIT NO. 3959 OF 2003**

Ranbaxy Laboratories Limited )
a company incorporated under the)
provisions of the Companies Act,)
1956 and having its registered )
office at A-11, S. A. S. Nagar, )
Ropar, Punjab and an administra-)
tive office at Ranbaxy House, )
Plot # 89, 15th Road, MIDC, )
Andheri (E), Mumbai - 400 093. ).....  Plaintiff.

Versus

Indkus Biotech (P) Ltd., a )
company incorporated under the )
provisions of the Companies Act )
1956 and having its registered )
office at 182, Sector 29, HUDA )
Panipat 132103 and a sales )
office at Santi Lal Building, )
1st Lane, Dharu Khana, Mumbai )

400 010. ... ... ).....  Defendant.

Mr. M.P.S. Rao for the plaintiff/applicant
Mr. H.W. Kane for the defendant.

**CORAM : ANOOP V.MOHTA JJ.**
**DATE : 27TH OCTOBER, 2005.**

**ORAL JUDGMENT :**

. This notice of motion has been taken out by the plaintiff against the defendant in reference to the trade mark "REVITAL" of the plaintiff and "RABITAL" of the defendant by invoking the provisions of Trade and Merchandise Marks Act, 1958 (for short "Trade Mark Act") and Copyright Act, 1957 (for short "Copyright Act") on the foundation of passing of and infringement to trade mark, Copyright and rendition of accounts for profit as contemplated under the Acts.

2. The plaintiff is a company incorporated under the Indian Companies Act, 1956 having its Business office at Ranbaxy House, Plot 89, 15th Road, MIDC,

Andheri (E), Mumbai-400 093.

3. The trade mark "REVITAL" is one of the well known product of the plaintiff company. The said trade mark is a nutritional category product ( ginseng with multi vitamins and minerals) The said product is available in India and abroad. The said trade mark has been continuously in use since 1988. The word "REVITAL" was adopted by the plaintiffs, which is coined, unique and an invented word. The said word is registered with the Trade Mark Registry having its registration No. 447972 in class No.05. The plaintiff have got the registration of trade mark REVITAL, renewed upto the year 2006. The plaintiff has also got the copyright registered for the cartons under the provisions of Copyright Act.

3. The plaintiff as per the market strategy and requirement took various steps to have the labels, network, blocks, dies stationery and sales promotional materials in relation to the trade mark. Accordingly the said product is in the market and can be purchased by the consumer and or layman without any prescription of Doctor. The wide publicity has been made involving

huge expenditure amounting to corers of Rupees during the short period of launching in the market, and earned tremendous reputation. The product "REVITAL" is identified exclusively with the plaintiff and no one else. The product as well as photographs are also a part of the record and specially to years 1996 to 2002. All these documents and materials in support of the above averments are exhibited and part of the record including various supporting literatures. The plaintiff therefore, by virtue of prior adoption and long, continuous and extensive user apart from large scale publicity has acquired an commendably and envitable reputation in the minds of traders and of the public being exclusive product of the plaintiff. The plaintiff’s right of exclusive use, need no further discussion. Therefore, any attempt by any person to use deceptively similar marks without the consent would definitely amounting to violation of plaintiff’s legal right as contemplated under the Trade Mark and Copyright Act.

4. The defendant started using its product under trade mark ’RABITAL" by manufacturing and marketing around March,2003. This word "RABITAL" is very similar

to mark "REVITAL" of the plaintiff. The two words are phonetically and visually quite similar. Except the words "AB " of the defendants, the trade mark is similar and to the trade mark of the plaintiff "REVITAL". The defendant has, further, copied the exact design and colour combination on the carton of its product as that of the REVITAL.

5. By an ad-interim order dated 19th December, 2003 the learned Single Judge has granted ad-interim relief in terms of prayer clause (a) and (b) except bracketed portion, which is reproduced as under;

" (a) The pending the hearing and final disposal of this suit, this Hon'ble Court be pleased to grant an order and injunction restraining the Defendant,its directors and employees/licencees as the case may be, its servants and agents (distributors, stockists) and the like from manufacturing marketing, selling, offering for sale, advertising, directly or indirectly or dealing in any manner in any medicinal or pharmaceutical preparation in any form bearing the trade mark RABITAL and/or using the said trademark RABITAL complained of and/or any other trade mark which is deceptively similar to the trademark REVITAL similar to that of the Plaintiffs and amounts to passing off;

"(b) The pending the hearing and final disposal of this suit, this Hon'ble Court be pleased to grant an order and injunction restraining the Defendants, its directors and employees/licencees as the case may be, its servants and agents, (distributors, stockists) and the like from manufacturing, selling, offering for sale, advertising

directly or indirectly dealing in pharmaceuticals items by using the pack design, colour scheme on their product RABITAL which is identical with and/or deceptively similar to that of the Plaintiff's pack design, colour scheme and the artistic work associated with the plaintiff's REVITAL."

This order remained unchallenged till this date. The defendant though served not filed any reply affidavit to the averments in the affidavit in support of the notice of motion, apart from the averments made in the suit in question. Interim order therefore, has been in force since 19th December, 2003.

6. Heard Mr. M.P.S. Rao, learned Counsel for the plaintiff and Mr. H.W. Kane, learned Counsel for the defendant. With the assistance of the learned Counsel appearing for the plaintiff. I have gone through the record and the colour photographs of the carton and products, manufactured and marketed by the defendant. The Counsel appearing for the defendant based on the material on the record basically contended that there is no breach of the provisions of both the Acts in question. The products are not phonetically visually and deceptively similar as sought to be contended by the plaintiff. He has relied on the case of ( **M/s John A. Wulfing V. Chemcial Industries and Pharmaceutical**

**Laboratories Ltd. and another) ( A.I.R. 1984 Bombay 281)** and further contended that there was no deceptive similarity between the two marks. The visual expression of the two words REVITAL and RABITAL are not conducive to any such confusion. The registration of trademark is only reference to the word "REVITAL" and therefore there is no right whatsoever of the plaintiff to agitate the issue of deceptive similarity of two trade marks in question. The Court is also not concerned with the hypothetical possibilities and it is not necessary at this stage to consider words side by side or by through microscopic examination.

7. There is no opposition to the legal submission based on the judgment referred above and relied by the Counsel appearing for the defendants **(Johnn) (Supra).** The issues and question relating to the interllactual property always need to be considered on the typical facts and circumstances. The facts of (Johnn) (Supra), are distinct and distinguishable.

8. In Oska’s Ltd’s Trade Mark (2005) R.P.C. 20 Osak’a Trade Mark Application, it has been observed in reference to confusion and distinctiveness of a trade

mark as under, while discussing the authorities relied by the parties in the matter;

"I am concerned by the hearing officer's reliance upon Laura Trade Mark, Sir Donald Nichollas V.C. trenchantly observed in Molnlycke AB V. Procter & Gamble Co. (No.5) (1994) R,.P.C. 49 at 113411.22-23 that;

"Citing previous decisions on a question of fact is not a useful, nor it is a proper, exercise."

It is therefore not correct, however tempting it may be, to try to decide whether there is likelihood of confusion in one case by drawing a factual analogy with a different case, as opposed to applying the principles of law established by that case."

Above observations are also sufficient to distinguish the above cited cases by the defendant, as that fact itself is distinguishable and distinct. Therefore, conclude that the plaintiff has established based on positive averments supported by material and ingredients which are necessary to grant ad-interim injunction.

9. On the "similar test" as expressed in Credit Masters Trade Mark (Chancery Division) (2005) R.P.C. 21) is also relevant in the present case;

"He took me through the development of the similarity test, starting with the well known case of Sabel BV V. Puna A.G. (1998) R.P.C. 199 at p.. 224:

"..The likelihood of confusion must therefore be appreciated globally, taking into account all factors relevant to the circumstances of the case. That global appreciation of the visual, aural or conceptual similarity or the marks in question, must be based on the overall impression given by the marks, bearing in mind, in particular, their distinctive and dominant components... The average consumer normally perceives a mark as a whole and does not proceed to analyse its various details". ( A point noted by the hearing officer as I have said). "In that perspective, the more distinctive the earlier mark, the greater will be the likelihood of confusion. It is therefore, not impossible that the conceptual similarity resulting from the fact that two marks use images with analogous semantic content may give rise to a likelihood of confusion where the earlier mark has a particularly distinctive, character, either per se or because of the reputation it enjoys with the public."

10. In **Corn Products Refining Co. V. Shangrila Food Products Ltd) (AI.R. 1960 S.C. 142**) in reference to word trade mark "Gluvita" and "Glucovita", the Supreme Court has observed that the overall structural and phonetic similarity and the similarity of the idea in the two marks must be considered. The important being one of the first impression from the point of view of a person of average intelligence and of imperfect recollection.

11. Based on the above foundation of law in the present case, after considering the rival contentions raised by the parties and after scrutinising the

averments and exhibits annexed to the plaint which include the colour photographs of the carton of the product REIVTAL of the plaintiff and colour photographs on carton of the defendants "Rabital", I am convinced that the word "Rabital" of the defendant is very similar and phonetically identical to the trade mark "Revital" of the plaintiff. On the first impression and from the lay man's point of view the colour combination of the cartoon and products including its design is quite similar, visualy as well as phonetically. I am also convinced that the defendant is using the said trade mark Rabital for the product which is identical to the product of the plaintiff. The plaintiff's products Revital and basic material are capsules Ginseng with multi vitamins & minerals. The Rabital product of the defendant is also in the form of capsules having composition of vitamins and minerals. The colour combination of both these cartons, including common consumer and market, likely to create confusion in view of the identical and deceptive similarity in design and colour combination of the carton.

12. The Counsel appearing for the defendant, emphasised that the prefix of the two words are totally

different. The Revital's prefix "Re" and Rabital's prefix "Ra" are totally different and there is no possibility of any confusion in the mind of lay man or the ultimate consumer of such product. I have noted the suffix "tal" of these words "Revital" and "Rabital". These two words are quite similar. Therefore, any vendor on the demand of Revital may supply the product of the defendant Rabital having common composition and having quite similarity in colour combination of carton and as are also in capsule form.

13. The last submission which was made by the learned Counsel appearing for the defendant that right if any can only be in reference to the registration of the word "Revital" and no other components. The argument needs to be rejected at this stage, as other positive averments made, based on the other material on the record, there is no doubt that the registration of trade mark "Revital" based on the registration of the word "Revital" has legal and supporting background. The word Rabital as used by the defendant on its product, at this stage for want of sufficient defence and supporting material on the record, no way disturb the prima facie case as made out by the plaintiff on positive averments

and material support of the case.

14 In the present case, in view of uncontroverted averments of the plaint and affidavit I am convinced with the defendant’s dishonest intention by adoption of mark "RABITAL" in respect of medicinal and pharmaceutical preparation is actuated with the clear intention of encashing upon the goodwill and reputation of the plaintiff, associated with its trademark and copyright in relation to the product. Therefore, such illegal adoption and use by the defendant which is identical to the plaintiff’s trade mark is bound to create confusion and deceptiveness in the mind of public and traders. The purchasing public will be induced into believing that the product being sold by the defendant also originates from the plaintiff’s source as they include unwary purchase and old age people, woman, children and thereby amounting to passing off by the defendant of its goods and business as that of the plaintiff.

15. The ingredients are made and as contemplated under order 39 rule 1 and 2 of Code of Civil Procedure and as observed by the Apex Court in ( **Midas Hygiene**

**Industries (P) Ltd and Another V. Sudhir Bhatia and others) (2004) (3) SCC 90**, has observed in para 5 as under;

"The law on the subject is well settled. In cases of infringement either of trade mark or of copyright, normally an injunction must follow. Mere delay in bringing action is not sufficient to defeat grant of injunction in such cases. The grant of injunction also becomes necessary if it prima facie appears that the adoption of the mark was itself dishonest."

16. In the present case there is no much delay after issuance of a " cease-and-desist" notice. The defendant has failed to respond to the suit,and notice of motion. The interim relief as made and stated above has been invoked within the territorial jurisdiction of this Court. In ( Exphar SA and another V. Eupharma Laboratories Ltd. and another (2004) 3 SCC 688, the Supreme Court has observed that even if there is some delay in claiming the protection of its world wide product, in the facts and circumstances no way disentitled the plaintiff to claim ad interim order as prayed. As observed in (Midas Hygiene) (Supra), and (Satyam Infoway Ltd. V. Sifynet Solutions (P) Ltd.) (2004) 6 S.C.C. 145, the balance of convenience and equity lies in favour of the plaintiff. The plaintiff will suffer irreparable loss and damages if the

injunction is refused. In view of the possibility of conclusion over the trade marks and copyright marks and the products in question, the confusion and mistakes likely to result in respect of the product in question, as it is available in the open market and can be purchased by any consumer or layman without any prescription. The degree of resemblances between the market potentiality are similar in idea. They are basically similar in the nature, characters and performance of the goods of the rival products. In view of the above referred Apex Court's decision and in view of the settled position of law of passing infringement and or grant of injunction, as contemplated under order 39 rule 1 and 2 of Code Civil Procedure, the judgment cited by the learned Counsel appearing for the defendant in no way supports the case of defendant at this stage. It is distinguishable on facts itself. In view of the above observation, on facts I am convinced that the case is made out by the plaintiff for confirmation of ad-interim order granted by this Court.

17. Taking all this into account the ad-interim order dated 19th December, 2003 is made absolute in terms of prayer clause (a) and (b) at this stage with

liberty to take out appropriate application if necessary. Notice of motion is disposed of accordingly by keeping all other points open in the trial.

**[ANOOP V. MOHTA, J.]**